

Below is an Opinion of the Court.

  
RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
ORCHARDS VILLAGE INVESTMENTS, LLC, ) No. 09-30893-rld11  
Debtor. ) MEMORANDUM OPINION

The confirmation hearing ("Confirmation Hearing") in this chapter 11 case took place over two days, starting on December 9, 2009.<sup>1</sup> Originally, the Confirmation Hearing was scheduled to consider confirmation of three competing plans: the plan proposed by the debtor, Orchards Village Investments, LLC ("Debtor"); the plan ("Joint Plan") proposed jointly by National Servicing and Administration, LLC ("NSA") and Pivotal Solutions, Inc. ("Receiver"); and the plan ("TIC Plan") proposed by Burgess Family Trust, Henry's Orchards Village, LLC and Sugarman's Orchard, LLC (collectively, the "TIC Investors"). However, at the beginning of the Confirmation Hearing, the Debtor, recognizing that

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<sup>1</sup> Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 its plan could not meet the test for feasibility, withdrew its  
2 reorganization plan from consideration. Thereafter, the proponents of  
3 the Joint Plan and the TIC Plan presented evidence and argument in  
4 support of their respective plans, and I heard evidence and argument  
5 supporting objections to the opposing plans.

6 In advance of the Confirmation Hearing, I reviewed the  
7 confirmation memoranda filed in support of the Joint Plan and the TIC  
8 Plan and the objections to the plans filed by interested parties. I also  
9 reviewed the proposed exhibits submitted by NSA and the Receiver and the  
10 Tenant in Common Investors. I have reviewed carefully the authorities  
11 cited to me by the various interested parties and other authorities that  
12 I consider relevant. I further have taken judicial notice of the docket  
13 and documents filed in this case for the purposes of ascertaining and  
14 confirming facts not reasonably in dispute. Fed. R. Evid. 201; In re  
15 Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006). I listened closely to  
16 the testimony of the witnesses presented at the Confirmation Hearing, and  
17 I have considered carefully and analyzed the arguments presented by  
18 counsel for the various interested parties.

19 In light of the foregoing preparations, review and analyses, I  
20 have reached a decision and am prepared to make the required findings of  
21 fact and conclusions of law on plan confirmation issues, pursuant to the  
22 requirements of Fed. R. Civ. P. 52(a), applicable with respect to this  
23 contested matter under Rules 9014 and 7052. I will confirm the Joint  
24 Plan and deny confirmation of the TIC Plan for the following reasons.

25 A. Confirmation Standards

26 The requirements for confirmation of a plan in chapter 11 are

1 set forth in § 1129. The court has an affirmative duty to make sure that  
2 all applicable requirements for confirmation under § 1129 have been met.  
3 In re Ambanc La Mesa Ltd. Partnership, 115 F.3d 650, 653 (9th Cir. 1997).  
4 The court will confirm a plan if the plan proponents prove by a  
5 preponderance of the evidence either 1) that all applicable requirements  
6 of § 1129(a) have been met, or 2) if the only condition to confirmation  
7 that is not satisfied is § 1129(a)(8), that the plan satisfies "cramdown"  
8 standards under § 1129(b), i.e., the plan "does not discriminate  
9 unfairly" against and is "fair and equitable" with regard to each  
10 impaired class that has not accepted the plan. In addition, under  
11 § 1129(c), if more than one plan meets the confirmation standards of §  
12 1129(a) and (b), the court must decide between or among them and confirm  
13 only one plan.

14 B. Summary of The Joint Plan

15 The Joint Plan provides for a prompt sale (the "Sale") of the  
16 Debtor's real and personal property interests in the Orchards Village  
17 senior living community in Vancouver, Washington ("Orchards Village") to  
18 Merrill Gardens, L.L.C. ("Merrill Gardens"), or such other buyer as is  
19 approved following an auction on terms approved by the Clark County,  
20 Washington Superior Court ("Superior Court"). Receivership proceedings  
21 are pending before the Superior Court with respect to the Debtor and a  
22 number of other entities with interests in Orchards Village, including  
23 the Tenant in Common Investors. Merrill Gardens has agreed to purchase  
24 Orchards Village for \$16,250,000.

25 Proceeds from the Sale will be distributed to pay  
26 administrative expenses of this case and the Superior Court receivership,

1 priority taxes and bankruptcy-related fees, outstanding real and personal  
2 property taxes, the allowed lien claim of the City of Vancouver,  
3 Washington, and the allowed construction lien claim of LSR Architects,  
4 Inc. Sale proceeds also will be distributed to pay a settlement  
5 negotiated with seven Orchard Village resident claimants ("Buy-In  
6 Residents") of their claims for recovery of the substantial sums ("Buy-In  
7 Payments") they paid at the times they began their resident status at  
8 Orchards Village. The Buy-In Residents' settlement amount ("Settlement  
9 Amount") will be paid in full on the effective date of the Joint Plan, in  
10 whole or in part from funds that otherwise would be distributed to NSA on  
11 its allowed secured claim. The principal amount of Washington Trust  
12 Bank's ("Washington Trust") allowed secured claim also will be paid in  
13 full on the effective date, in whole or in part from funds that would  
14 otherwise be distributed to NSA on its allowed secured claim. NSA and  
15 Washington Trust have agreed to waive default interest and late charges  
16 against the Debtor if the Joint Plan is confirmed. However, NSA and  
17 Washington Trust would retain any claims against third parties, including  
18 claims against guarantors of the Debtor's obligations to them.

19           General unsecured creditors and equity interests potentially  
20 could receive distributions under the Joint Plan if the Sale results in a  
21 higher purchase price than the outstanding offer from Merrill Gardens,  
22 but all parties recognize that the prospects for such a higher purchase  
23 price are remote at best. The most likely result under the Joint Plan is  
24 that general unsecured creditors and equity interests would receive no  
25 distributions. After the closing of the Sale and the liquidation and  
26 distribution of any remaining claims and other property of the Debtor,

1 the Debtor would be deemed dissolved and would not continue in business.

2 C. Summary of the TIC Plan

3 The TIC Plan provides for a change in management of Orchards  
4 Village but contemplates that ownership will be held by some new and some  
5 old investors. Accordingly, the Debtor would continue as a reorganized  
6 entity after confirmation of the TIC Plan.

7 Like the Joint Plan, the TIC Plan provides that administrative  
8 expenses, bankruptcy-related fees, outstanding real and personal property  
9 taxes, and the allowed lien claim of the City of Vancouver, Washington  
10 will be paid in full on the effective date of the TIC Plan. Priority tax  
11 claims, if any, would be paid over a term of five years with interest.  
12 It is not clear from the TIC Plan what is contemplated with respect to  
13 unpaid administrative expenses of the Superior Court receivership, but  
14 such expenses arguably could be considered and treated as "Administrative  
15 Expense Claims," as defined in the TIC Plan. However, the TIC Plan  
16 provides that any allowed secured claim of the Receiver would be paid  
17 within 30 days following the date that such claim is allowed.

18 NSA's allowed secured claim would be paid in full with interest  
19 at 5% per annum on the following terms: NSA would receive interest-only  
20 payments for three years; it further would receive payments of principal  
21 and interest amortized over thirty years for four years; and a balloon  
22 payment of the balance of NSA's allowed secured claim, together with any  
23 accrued and unpaid interest, would be due and payable at the end of seven  
24 years. In order to resolve an objection by Washington Trust, which had  
25 elected to be treated in accordance with § 1111(b), Washington Trust  
26 would be paid the principal of its allowed secured claim in equal monthly

1 installments of \$11,000 each over seven years, with the balance due and  
2 payable at the end of seven years. The allowed secured claim of LSR  
3 Architects, Inc. would be paid in monthly installments of interest only,  
4 at 5% per annum, for seven years, with the entire principal and any  
5 balance of interest due at the end of seven years. Buy-In Residents  
6 would be paid according to their contracts (collectively, "Buy-In  
7 Contracts") in 20 equal quarterly installments starting on January 1,  
8 2010. According to terms of the Buy-In Contracts, the Buy-In Residents  
9 each would be paid a total of 75% of their Buy-In Payments. See, e.g.,  
10 Ex. 203-Bishop, at p. 3. General unsecured creditors would receive a  
11 total of 30 percent of their allowed unsecured claims in 20 equal  
12 quarterly payments, commencing on January 1, 2010. Equity interests  
13 would be extinguished, but the TIC Investors and Carburton Properties 8,  
14 LLC ("Carburton") would have the option of retaining their prepetition  
15 tenant in common interests in Orchards Village real and personal property  
16 or converting those interests into membership interests in the  
17 reorganized Debtor. In addition, the TIC Investors, Carburton,  
18 prepetition members of the Debtor, and any creditor with a claim against  
19 the Debtor would be offered the opportunity to purchase equity in the  
20 reorganized Debtor in increments of \$10,000, up to a maximum of  
21 \$1,250,000, on a "first come, first served," private placement basis.

22 The deadline for filing ballots accepting or rejecting the TIC  
23 Plan was December 2, 2009. On December 7, 2009, the TIC Investors filed  
24 an Amended and Restated Motion to Modify the TIC Plan to reclassify and  
25 create a separate class of claims from the class of general unsecured  
26 claims for the unsecured claims of the TIC Investors and Carburton. See

1 Docket No. 376.

2 D. Evidence in Light of Objections

3 Over the first day and a half of the Confirmation Hearing, the  
4 plan proponents submitted exhibits and testimony in support of  
5 confirmation of their respective plans. At the conclusion of testimony,  
6 I closed the evidentiary record. Based on that record, I find that  
7 § 1129(a)(6) and (13) through (16) are inapplicable in this case.

8 With respect to the other requirements of § 1129(a) and (b), as  
9 applicable, objections were made by various parties to the Joint Plan and  
10 the TIC Plan on a number of grounds that I address in turn.

11 1. Objections to the Joint Plan

12 Objections to the Joint Plan were filed by the United States  
13 Trustee ("UST"), the TIC Investors and the Debtor.

14 a. UST Objection

15 The UST objected that the exculpation and indemnification  
16 provisions of the Joint Plan for the Receiver as "Plan Agent" and its  
17 employees, agents and representatives was too broad, as it shielded them  
18 from liability for all acts other than bad faith, willful misconduct,  
19 gross negligence and willful disregard of duties. The Joint Plan  
20 proponents resolved that objection by extending liability to breaches of  
21 fiduciary duty and negligence and represented to the court in their  
22 confirmation memorandum that the concerns of the UST had been satisfied.  
23 The UST did not appear at the Confirmation Hearing to raise any further  
24 objection.

25 b. TIC Investors Objections

26 The TIC Investors objected for two reasons: First they

1 argue that the Joint Plan is not feasible. Since the Joint Plan is a  
2 "sale" or "liquidation" plan under which the Debtor will not continue in  
3 business and will be dissolved, the TIC Investors' arguments focused on  
4 the viability of the Sale. They argue that since the Joint Plan  
5 proponents only request authority to sell the Debtor's interest in  
6 Orchards Village under the Joint Plan and have not sought authority to  
7 sell the interests of co-owners under § 363(h),<sup>2</sup> they have no authority  
8 to sell the interests of co-owners, including the TIC Investors.

9 It is not clear whether the proponents of the Joint Plan  
10 could claim the authority of a trustee (or a debtor in possession in  
11 chapter 11) under § 363(h) to sell the interests of co-owners of Orchards  
12 Village. However, in any event, if the Joint Plan is confirmed, the  
13 Receiver would be authorized to sell the Debtor's tenant in common  
14 interests in the real and personal property of Orchards Village, and  
15 under the Superior Court's order appointing the Receiver, the Receiver  
16

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17 <sup>2</sup> Section 363(h) provides that,

18 the trustee may sell both the estate's interest . . . and the interest of  
19 any co-owner in property in which the debtor had, at the time of the  
20 commencement of the case, an undivided interest as a tenant in common,  
21 joint tenant, or tenant by the entirety, only if-

22 (1) partition in kind of such property among the estate and such  
23 co-owners is impracticable;

24 (2) sale of the estate's undivided interest in such property would  
25 realize significantly less for the estate than sale of such property free  
26 of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of  
the interests of co-owners outweighs the detriment, if any, to such co-  
owners; and

(4) such property is not used in the production, transmission, or  
distribution, for sale, of electric energy or of natural or synthetic gas  
for heat, light or power.



1 has "the authority to sell all of the real and personal property of the  
2 Receivership Defendants," including all of the other co-owners of real  
3 and personal property of Orchards Village. See Ex. 152, at p. 4. Based  
4 on the evidence presented at the Confirmation Hearing, I find that the  
5 proponents of the Joint Plan have the necessary authority to sell all  
6 real and personal property interests in Orchard Village.

7           The TIC Investors further argued that the Joint Plan  
8 proponents had offered no proof beyond an expired, non-binding letter of  
9 intent that Merrill Gardens was prepared to proceed as purchaser to close  
10 the sale.

11           Douglas Spear, Chief Financial Officer of Merrill Gardens,  
12 testified at the Confirmation Hearing. He confirmed Merrill Gardens'  
13 commitment to the Sale, pursuant to an Asset Purchase Agreement, dated  
14 November 11, 2009. See Ex. 178. He further stated that there was no  
15 financing contingency to Merrill Gardens proceeding with closing the  
16 Sale, as Merrill Gardens had cash available to pay the entire \$16,250,000  
17 purchase price from sales of 24 facilities in the eastern United States.  
18 Letters supporting Merrill Gardens' ability to close the sale were  
19 submitted by Bank of America Merrill Lynch and JP Morgan. See Exs. 180  
20 and 192. Based on the evidence presented, I find that the Sale proposed  
21 in the Joint Plan is feasible.

22           Second, the TIC Investors argue that the Joint Plan is not  
23 "fair and equitable" because nonpriority unsecured creditors are not  
24 expected to receive any distribution under the Joint Plan. Since the  
25 class of nonpriority unsecured creditors did not vote to approve the  
26 Joint Plan, it would not be fair and equitable to cram down their claims

1 under § 1129(b) to confirm the Joint Plan, when the TIC Plan provides for  
2 at least a partial distribution on allowed nonpriority unsecured claims  
3 over time.

4           Section 1129(b) provides that if all requirements of  
5 § 1129(a) are satisfied, other than § 1129(a)(8), which requires that  
6 each class of claims either have accepted the plan or be unimpaired by  
7 the provisions of the proposed plan, a chapter 11 plan may be confirmed  
8 in spite of rejection by an impaired class of unsecured claims if the  
9 plan does not discriminate unfairly and is "fair and equitable" in its  
10 treatment of such class. "Fair and equitable" is a term of art in  
11 chapter 11. It requires either: 1) that the holders of claims in a  
12 rejecting unsecured class receive or retain on account of their claims  
13 property equal to the allowed amounts of their respective claims; or 2)  
14 that no class of claims or interests junior to the subject class receive  
15 anything under the plan to be confirmed. § 1129(b)(2)(B).

16           As noted above, all parties concede that the possibility  
17 that nonpriority unsecured claimants will receive any distribution under  
18 the Joint Plan is remote at best. The Summary of Acceptances and  
19 Rejections ("Ballot Summary") filed in this case (Docket No. 378)  
20 reflects that the class of nonpriority unsecured creditors under the  
21 Joint Plan ("Class 8") did not accept the Joint Plan. However, no class  
22 junior to Class 8 under the Joint Plan will receive anything. Equity  
23 interests are treated as subordinate to all allowed claims and are to be  
24 cancelled and become null and void on the effective date of the Joint  
25 Plan.

26           "An alternate form of cramdown is to eliminate all junior

1 classes to the dissenting class . . . . The test is simple: after  
2 establishing the existence of junior interests, show that they are  
3 eliminated." 7 Collier on Bankruptcy ¶ 1129.05[3][b], at 1129-156 (Alan  
4 N. Resnick & Henry J. Sommer eds, 15th ed. revised 2009). In spite of  
5 the Class 8 vote to reject the Joint Plan, since equity interests receive  
6 nothing under the Joint Plan, I find that the "fair and equitable" test  
7 for cramdown of nonpriority unsecured claims under the Joint Plan is  
8 satisfied.

9 c. Debtor Objections

10 The Debtor raised a number of objections to confirmation of  
11 the Joint Plan but participated only to a very limited extent in the  
12 presentation of evidence at the Confirmation Hearing and did not  
13 participate in argument. While the Debtor's objections are stated under  
14 seven separate headings (see Docket No. 360), a number of Debtor's  
15 objections are essentially variations on the same point and will be  
16 discussed together, as appropriate.

17 First, the Debtor summarily echoes the argument of the TIC  
18 Investors that the Joint Plan does not comply with applicable provisions  
19 of the Bankruptcy Code because the proponents of the Joint Plan did not  
20 obtain authority to sell all tenant in common interests in Orchards  
21 Village real and personal property under § 363(h). As discussed above,  
22 the Debtor's tenant in common interests in Orchard Village can be sold  
23 pursuant to the Joint Plan, and the Receiver has authority to sell all  
24 tenant in common interests of other Orchards Village owners under the  
25 Superior Court order appointing the Receiver. However, the Debtor  
26 further argues that the Receiver was not authorized by this court to

1 employ the broker ("Broker") who assisted the Receiver in orchestrating  
2 the sale process that generated the proposed sale to Merrill Gardens and  
3 thus violated the provisions of the Bankruptcy Code governing the  
4 employment of professionals. See, e.g., §§ 327, 328 and 330.

5           The Receiver was authorized to employ the Broker by order  
6 of the Superior Court in the receivership proceedings, entered on or  
7 about May 15, 2009. See Exhibit 173. No evidence was presented at the  
8 Confirmation Hearing that any party objected to the employment of the  
9 Broker by the Receiver. In fact, from the testimony and other evidence  
10 presented at the Confirmation Hearing, the Broker did a phenomenal job in  
11 contacting and winnowing potential purchasers for Orchards Village and  
12 assisted in bringing Merrill Gardens to the table with an outstanding  
13 purchase offer. While the Joint Plan contemplates a sale of Orchards  
14 Village, any such sale will be conducted under auction procedures  
15 determined by the Superior Court. Accordingly, in this specific case, I  
16 find no violation of the Bankruptcy Code in the Receiver's conduct in  
17 employing the Broker.

18           The Debtor next focuses on arguments that the Joint Plan is  
19 unfairly discriminatory in its treatment of the Buy-In Residents, as  
20 opposed to other creditors with unsecured claims, including lessors with  
21 unassumed leases and "insider" creditors. At the outset, I note that the  
22 Joint Plan does not separately classify "insider" claims. In fact, the  
23 term "insider" is not even defined in the Joint Plan.

24           That a plan does not "discriminate unfairly" against any  
25 impaired class that does not accept the plan is a requirement for  
26 cramdown under § 1129(b)(1). These Debtor arguments all boil down to a

1 contention that the Joint Plan improperly classifies and prefers the  
2 claims of the Buy-In Residents to claims of other unsecured creditors,  
3 who likely will receive nothing under the Joint Plan.

4           Section 1123 requires classification of claims in a chapter  
5 11 plan. Section 1122(a) provides that "a plan may place a claim or an  
6 interest in a particular class only if such claim or interest is  
7 substantially similar to the other claims or interests of such class."  
8 Similar claims generally are placed in the same class unless there are  
9 legitimate business or other reasons for separate classification. See,  
10 e.g., In re Simon, No. 07-31414-KRH, 2008 WL 2953471, at \*2 (E.D. Va.  
11 July 29, 2008)("If a plan proponent can articulate legitimate differences  
12 among otherwise substantially similar claims and if separate  
13 classification is in the best interest of creditors and will foster  
14 reorganization, then separate classification may be proper."); In re  
15 Trimm, Inc., 2000 WL 33673795, at \*5 (Bankr. M.D.N.C. Feb. 17, 2000)  
16 ("Numerous courts have recognized that if there is a valid business  
17 justification then creditors which otherwise have the same priority  
18 status under the bankruptcy system may be classified and treated  
19 differently.").

20           The claims of the Buy-In Residents are different in some  
21 fundamental ways from the claims of general unsecured creditors in this  
22 case. The Buy-In Residents paid substantial sums from their life savings  
23 "up front" when they contracted with "Orchards Village, LLC," a  
24 nonexistent entity, to join the Orchards Village senior living community.  
25 While I have not made any final determinations as to the amounts of the  
26 respective claims of the Buy-In Residents, for voting purposes with

1 respect to plan confirmation, the Debtor stipulated with counsel for the  
2 Buy-In Residents that their individual claims ranged from \$102,000 to  
3 \$180,000. See Docket No. 339. For projection purposes, the TIC  
4 Investors treated the Buy-In Residents' claims as ranging from \$113,492  
5 to \$199,325. See Exhibit 201, at p. 8. In prior proceedings before this  
6 court, Eugene Rizzo, one of the Buy-In Residents, testified that he paid  
7 \$200,000 under his Residence Agreement. See Memorandum Opinion, Docket  
8 No. 113, at p. 23.

9           The Buy-In Residents did not extend credit to the Debtor  
10 like trade creditors, with the expectation of repayment and future  
11 business, or like investors, with the expectation of a return on their  
12 investments. The Buy-In Residents expected to move into Orchards Village  
13 and remain there for the rest of their lives. See, e.g., Exhibit 203, at  
14 p. 2, paragraphs 1 and 2.

15           Since the Debtor's bankruptcy filing, the Buy-In Residents  
16 have filed an adversary proceeding ("Adversary Proceeding") before this  
17 court, asserting claims for unjust enrichment, fraud, an equitable lien  
18 against Orchards Village, constructive trust, conversion and breach of  
19 contract against the Debtor and a number of other parties, including the  
20 TIC Investors. See Amended Complaint, Docket No. 3 in Case No. 09-03186.  
21 Under the Joint Plan, the Adversary Proceeding would be settled by  
22 payment of the Settlement Amount to the Buy-In Residents. In the  
23 Debtor's own Disclosure Statement, the Debtor Stated: "If [Debtor] does  
24 not pay the [Buy-In Residents'] Allowed Unsecured Claims in full, it  
25 could cause harm to the reputation of [Orchards Village], jeopardize  
26 [Debtor's] reorganization, impact [Debtor's] ability to attract new

1 residents, and could impact the general morale of the facility which  
2 could affect the attrition rate." Debtor-In-Possession's Second Amended  
3 Disclosure Statement, Docket No. 296, at p. 12, Lines 14-17. In other  
4 words, if the perceived result for the Buy-In Residents in this case is  
5 that they are "stiffed" on their Buy-In Claims, the reputation of  
6 Orchards Village likely would be materially harmed no matter who ends up  
7 owning and running it. Indeed, recognizing that reality, the claims of  
8 the Buy-In Residents are separately classified in the Debtor's plan  
9 (Class 12) and in the TIC Plan (Class 6), as well as in the Joint Plan,  
10 although the treatments of the Buy-In Residents' claims among the three  
11 plans are substantially different.

12           Once appropriate distinctions are recognized for separate  
13 classification of claims, the treatment of any particular class of claims  
14 is discretionary with the plan proponent so long as all class members are  
15 treated equally. See 7 Collier on Bankruptcy ¶ 1123.01[4][b], at 1123-10  
16 ("The equality addressed by section 1123(a)(4) extends only to the  
17 treatment of members of the same class of claims and interests, and not  
18 to the plan's overall treatment of the creditors holding such claims or  
19 interests."). The Joint Plan documents and provides means for the  
20 implementation of a settlement with the Buy-In Residents that preserves  
21 value for Orchards Village and allows for a sale of Orchards Village at a  
22 premium price. That it recognizes distinctions and reasons for treating  
23 the claims of the Buy-In Residents differently and more generously than  
24 the claims of unsecured creditors generally does not make the Joint Plan  
25 unfairly discriminatory. I find that the Debtor's objections on those  
26 grounds are appropriately overruled.

1           The Debtor further objects that the Joint Plan does not  
2 provide that any separate assets of Orchard Village Properties, LLC  
3 ("OVP") be sold for the benefit of OVP's creditors. OVP is not in  
4 bankruptcy and is not a debtor in this case. OVP is an entity in  
5 receivership under the jurisdiction of the Superior Court. See Exhibit  
6 152, at pp. 1-2. If the Debtor has any objection to the liquidation and  
7 distribution of OVP assets in a sale subject to the approval of the  
8 Superior Court, I suggest that the Debtor raise any such objection before  
9 the Superior Court. Debtor's objection on this ground is overruled.

10           Debtor also objects that the indemnification clause in the  
11 Joint Plan is overbroad, without specifying with any clarity any  
12 particular defects that render the indemnification provision violative of  
13 the Bankruptcy Code. As noted above, the Joint Plan proponents have  
14 agreed to amend the exculpation and indemnification provisions of the  
15 Joint Plan to satisfy the objection of the UST, consistent with the  
16 court's decision in In re WCI Cable, Inc., 282 B.R. 457, 478-80 (Bankr.  
17 D. Or. 2002). Based on the agreed amendments to the indemnification  
18 provisions in the Joint Plan, I will overrule Debtor's objection on this  
19 ground.

20           Finally, Debtor objects to the Joint Plan on the ground  
21 that it "may" violate the State of Washington's receivership statutes.  
22 The Debtor cites no authority for this argument and presented no  
23 supporting evidence or argument at the Confirmation Hearing. I therefore  
24 find that this objection lacks merit.

25           d. Confirmation Requirements

26           Under § 1126(c), a class of creditors is deemed to accept a



1 chapter 11 plan if "at least two-thirds in amount and more than one-half  
2 in number of the allowed claims" of voting class members vote to accept  
3 the plan. The impaired creditor classes under the Joint Plan, with the  
4 exception of the class of general unsecured claims, voted unanimously to  
5 accept the Joint Plan. The class of equity interests is impaired and was  
6 deemed to have rejected the Joint Plan. Based on the foregoing  
7 discussions of the requirements that the plan not "discriminate unfairly"  
8 and be "fair and equitable" with respect to dissenting classes, I find  
9 that the Joint Plan meets the test for cramdown of general unsecured  
10 claimants and equity interests under § 1129(b).

11 Based on the evidence presented at the Confirmation  
12 Hearing, as discussed in relevant part above, I find that the Joint Plan  
13 satisfies the applicable requirements for confirmation set forth in  
14 § 1129(a) and (b).

15 2. Objections to the TIC Plan

16 Objections to the TIC Plan were filed by Washington Trust, the  
17 Buy-In Residents, NSA and the Receiver.

18 a. Washington Trust Objections

19 Initially, Washington Trust objected to its treatment under  
20 the TIC Plan based upon its election to have its claim treated as fully  
21 secured pursuant to § 1111(b). The TIC Investors moved to amend the TIC  
22 Plan to pay the principal of Washington Trust's claim in full, in equal  
23 monthly installments of \$11,000 over 84 months, with any unpaid balance  
24 due at the end of 84 months. Washington Trust agreed that its amended  
25 treatment in the TIC Plan would moot this objection.

26 Washington Trust further objects that the TIC Plan is not

1 feasible, being based on uncertain financial assumptions and projections.  
2 Part of Washington Trust's feasibility objection was based on the TIC  
3 Investors' initial failure to provide for the secured lien claim of the  
4 City of Vancouver, Washington in the TIC Plan. However, the TIC  
5 Investors have moved to amend the TIC Plan to provide that the allowed  
6 lien claim of the City of Vancouver, Washington would be paid in full on  
7 the effective date of the TIC Plan, mooted this portion of the  
8 objection. Each of the Buy-In Residents, NSA and the Receiver have  
9 joined with feasibility objections of their own to the TIC Plan, and I  
10 consider all of the feasibility objections together.

11 Under Section 1129(a)(11), in order to confirm a  
12 reorganization plan in chapter 11, I must find that the plan is feasible,  
13 with confirmation not likely to be followed by the liquidation or need  
14 for further financial reorganization of the debtor. I am not required to  
15 find that the future financial success of the reorganized debtor is  
16 guaranteed to make a finding of feasibility.

17 Guaranteed success in the stiff winds of commerce  
18 without the protection of the Code is not the standard  
19 under § 1129(a)(11). Most debtors emerge from  
20 reorganization with a significant handicap. But a  
21 plan based on impractical or visionary expectations  
cannot be confirmed . . . . All that is required is  
that there be reasonable assurance of commercial  
viability.

22 In re Prudential Energy Co., 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986).  
23 See also In re Acequia, Inc., 787 F.2d 1352, 1364 (9th Cir. 1986); In re  
24 Pizza of Hawaii, Inc., 761 F.2d 1374, 1382 (9th Cir. 1985) ("The purpose  
25 of section 1129(a)(11) is to prevent confirmation of visionary schemes  
26 which promise creditors and equity security holders more under a proposed

1 plan than the debtor can possibly attain after confirmation."); and In re  
2 Sagewood Manor Assoc. Ltd. Partnership, 223 B.R. 756, 762-63 (Bankr. D.  
3 Nev. 1998) ("While a reviewing court must examine 'the totality of the  
4 circumstances' in order to determine whether the plan fulfills the  
5 requirements of § 1129(a)(11), . . . only 'a relatively low threshold of  
6 proof [is] necessary to satisfy the feasibility requirement.' . . . The  
7 key element of feasibility is whether there exists a reasonable  
8 probability that the provisions of the plan of reorganization can be  
9 performed.").

10 "Factors that the court should consider in evaluating  
11 evidence as to feasibility include '(1) the adequacy of the financial  
12 structure; (2) the earning power of the business; (3) economic  
13 conditions; and (4) the ability of management.'" In re WCI Cable, Inc.,  
14 282 B.R. at 486 (quoting In re Agawam Creative Marketing Assoc. Inc., 63  
15 B.R. 612, 619-20 (Bankr. D. Mass. 1986), which in turn was quoting In re  
16 Merrimack Valley Oil Co., Inc., 32 B.R. 485, 488 (Bankr. D. Mass. 1983)).

17 The TIC Investors' financial projections ("Projections")  
18 for the reorganized Debtor following confirmation of the TIC Plan, and  
19 the supporting assumptions for the Projections, are set forth in Exhibit  
20 201.<sup>3</sup> Mr. Peter S. Muhlbach, President and Chief Executive Officer of  
21 Encore Senior Living, LLC ("Encore"), the proposed operator of Orchards  
22 Village under the TIC Plan, testified as to the preparation and  
23 underlying assumptions of the Projections. Mr. Muhlbach has an  
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25 <sup>3</sup> The Projections in Exhibit 201 are revised from the projections  
26 ("TIC Disclosure Projections") included by the TIC Investors in their  
approved Disclosure Statement. See Exhibit 147.

1 accounting background and testified from that experience, as well as his  
2 experience as a chief financial officer for a senior assisted living  
3 company. Mr. Muhlbach testified that he developed the Projections  
4 following a visit to Orchards Village, based on the Receiver's monthly  
5 reports filed with the Superior Court and his own knowledge from  
6 operating senior living communities. He noted that Orchards Village  
7 looks "brand new," and is clean and well-maintained. Accordingly, he  
8 assumed that no major capital expenditures would be required for Orchards  
9 Village in the short-run. He assumed a gradual increase in Orchards  
10 Village occupancy, based on the growth experienced during the Receiver's  
11 tenure, until stabilization at 108 units occupancy (approximately 95%)  
12 at the end of 2010. He assumed that rates charged to the residents would  
13 gradually increase over time, as residency turns over. Expenses likely  
14 would increase at a slightly greater rate than revenues until  
15 stabilization is achieved, and thereafter revenues likely would increase  
16 at a slightly greater rate than expenses. The Projections assume  
17 positive net cash flow ranging from \$113,059 in 2010, increasing  
18 thereafter to a minimum of \$304,358 per year through 2014. The  
19 Projections also assume an injection of \$1,000,000 new investor money to  
20 provide working capital. New investors in fact have pledged a total of  
21 \$1,220,000 if the TIC Plan is confirmed, including \$400,000 from Encore.  
22 See Exhibit 200 and tabs thereunder and Exhibit 217. Mr. Muhlbach also  
23 assumed that a refinance of remaining TIC Plan debt would be viable after  
24 84 months of Orchards Village operations under Encore management.

25 Various questions were raised about the Projections during  
26 cross-examination of Mr. Muhlbach and during the testimony of other

1 witnesses. Exhibit 186 is a comparative analysis of the TIC Disclosure  
2 Projections for 2010 results (see Exhibit 147) with a straight-line  
3 projection for 2010 based on annualized actual operating results for  
4 October 2009 under the receivership. The notes to Exhibit 186 raise  
5 concerns that the Projections may be too optimistic for the following  
6 reasons. First, the Projections assume that 20 additional units could be  
7 rented at higher assisted living rates when their conversion from  
8 independent living unit status has not yet been approved. Second, the  
9 Projections assume a 2 units per month increase in the rate of occupancy  
10 until stabilization, while actual increases in occupancy for May through  
11 October 2009 averaged only 1.67 units. As a bottom-line matter, the  
12 Exhibit 186 comparative analysis posits a swing to 2010 net cash flow of  
13 -\$664,706 from the TIC Disclosure Projections to the annualized October  
14 2009 operating results.

15 On cross-examination, Mr. Muhlbach testified that he had  
16 not projected income as assisted living units for the 20 independent  
17 living units under application to convert to assisted living, even though  
18 the assumptions for the Projections specifically state that,

19 The revenue and expense [Projections] assume  
20 conversion of independent living to assisted living is  
21 complete with 20 new assisted living apartments and  
that there will be no additional conversions.

22 See Exhibit 201, at p. 7 and Exhibit 147, at p. 2. Under cross-  
23 examination, Douglas Baynham, the current operations manager at Orchards  
24 Village, testified that the operating expenses for October 2009 were high  
25 at \$178,000, compared to an approximate average of \$152,000 per month in  
26 2009.

1           In addition, as noted in argument, the TIC Plan requires  
2 that distributions totaling approximately \$600,000 be made on or about  
3 the effective date to pay outstanding real and personal property taxes,  
4 administrative expenses and the secured lien claim of the City of  
5 Vancouver, Washington, eating substantially into the reorganized Debtor's  
6 working capital, assuming that the subscribing investors meet their  
7 investment commitments.

8           I have considered all of the testimony and evidence  
9 submitted with respect to the question of feasibility of the TIC Plan.  
10 It is important to remember that projecting future financial results from  
11 the operations of a business is not an exact science. Projections never  
12 turn out exactly as forecast because there are too many variables in  
13 actual operations to allow for such accuracy. I found Mr. Muhlbach's  
14 testimony to be credible, and the assumptions that he discussed  
15 underlying the Projections appeared plausible. The opposing testimony  
16 and evidence focused on the possibilities that the Projections were too  
17 high in their estimates of net cash flow for Orchards Village; that the  
18 working capital to be raised from investors would be too small to meet  
19 Orchards Village's operating needs; and that financing to complete TIC  
20 Plan obligations would not be available when balloon obligations under  
21 the plan come due.

22           However, in light of the forgiving standard for feasibility  
23 under § 1129(a)(11), I find that the TIC Investors have met their  
24 evidentiary burden. The Projections for net cash flow from Orchards  
25 Village operations, particularly in 2010, may prove high, and Encore may  
26 have to spend more working capital than anticipated to keep Orchards

1 Village operations running smoothly. Nevertheless, even after the  
2 effective date distributions under the TIC Plan are made, there should be  
3 working capital from investments available to fund operating shortfalls  
4 in the range of \$400,000-\$600,000. I found the testimony of the various  
5 investment subscribers who testified credible that they had ready money  
6 available to fulfill their investment pledges. As to the prospects for  
7 refinancing at month 84, while plenty of evidence was presented to the  
8 effect that commercial lending for the acquisition and development of  
9 senior assisted living communities had essentially dried up for the  
10 present, I find the assumption reasonable, at least for feasibility  
11 purposes, that lending conditions ought to be more congenial when  
12 Orchards Village needs refinancing at the end of the TIC Plan term. I  
13 conclude that the TIC Investors have met the test for feasibility under  
14 § 1129(a)(11).

15           b. Buy-In Residents Objections

16           The Buy-In Residents add two twists to the feasibility  
17 issue that need to be addressed separately. First, they quote from the  
18 TIC Investors' disclosure statement:

19           If Debtor does not pay Buy-In Residents' Allowed  
20           Secured Claims in full, it will cause immeasurable  
21           harm to the reputation of [Orchards Village] and  
22           seriously jeopardize Reorganized Debtor's ability to  
23           attract new residents to the Facility, making it  
24           impossible for Debtor to reorganize its business.

25           TIC Investors' Second Amended Disclosure Statement, Docket No. 295, at p.  
26           14. Under the TIC Plan, the Buy-In Residents' claims will not be paid in  
27 full, and the payments they receive will be made in 20 quarterly  
28 installments commencing in 2010. Accordingly, by the standard

1 articulated by the TIC Investors themselves in their disclosure  
2 statement, the Buy-In Residents argue that it will be impossible for the  
3 Debtor to reorganize its business under the TIC Plan.

4           The Buy-In Residents' point provides a further basis for  
5 discounting the operating results posited in the Projections, but  
6 ultimately, I do not find that it materially undermines the court's  
7 previous analysis and finding of feasibility.

8           The Buy-In Residents further argue that in rejecting the  
9 OVP lease to operate Orchards Village, the TIC Plan ignores the  
10 ramifications of § 365(h)(1)(A),<sup>4</sup> where the Receiver arguably stands in  
11 the shoes of OVP as the Orchards Village lessee. Under current  
12 circumstances, I find that the OVP lease issue is a red herring. The  
13 Receiver was appointed as a general receiver for OVP, the Debtor and the  
14 other entities with ownership interests in Orchards Village on August 22,  
15 2008. See Exhibit 152. I previously have found that following the  
16 Receiver's appointment by the Superior Court, OVP relinquished its  
17 license to operate Orchards Village, and the Washington Department of  
18 Social and Health Services issued a provisional license to Regency  
19 Pacific, Inc. to operate Orchards Village under the supervision of the  
20 Receiver. See Memorandum Opinion, Docket No. 113, at p. 4. The  
21 continuing receivership proceedings before the Superior Court certainly  
22 complicate arrangements for turnover of Orchards Village to Encore if I  
23 confirm the TIC Plan. However, no party has argued that in the event I  
24

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25           <sup>4</sup> The Buy-In Residents actually cite § 365(h)(2)(A), but that  
26 neighboring provision deals with the rejection of timeshare interests.  
It is not relevant to the argument that the Buy-In Residents are making.



1 confirm the TIC Plan, the TIC Investors cannot move the Superior Court to  
2 terminate the receivership. I will not speculate on what the Superior  
3 Court will do if such a motion is brought before it, but I do find that  
4 the fact that the receivership proceedings are on-going does not destroy  
5 the feasibility of the TIC Plan. I will overrule the Buy-In Residents'  
6 objections.

7 c. Receiver Objections

8 The Receiver raised a number of objections to the TIC Plan,  
9 some of which have been dealt with by the TIC Investors' proposed  
10 amendments to their plan. For example, the Receiver objected to the TIC  
11 Plan because it did not classify or provide for the secured lien claim of  
12 the City of Vancouver, Washington. The TIC Investors have amended the  
13 TIC Plan to provide that the allowed secured claim of the City of  
14 Vancouver, Washington will be paid in full on the effective date of the  
15 plan, rendering the Receiver's objection moot.

16 Of greater significance is the Receiver's objection that no  
17 impaired class of claims accepted the TIC Plan, as required under  
18 § 1129(a)(10). The TIC Investors' Second Amended Plan (Docket No. 294)  
19 that was distributed to creditors and other interested parties for  
20 balloting listed eight impaired classes, including Class 8 (Interests).  
21 By the December 2, 2009 voting deadline, no impaired class of claims had  
22 voted in favor of the TIC Plan. On December 7, 2009, the TIC Investors  
23 filed a motion to amend the TIC Plan to add a new Class 11 "consisting of  
24 the unsecured claims of TIC Investors." See Docket No. 376, at p. 3.  
25 NSA and the Receiver objected to the TIC Investors' motion, noting that  
26 only five creditors voted in favor of the TIC Plan. Four of the five

1 were the members of the proposed new impaired Class 11. See Docket No.  
2 379, at p. 2. NSA and the Receiver argue that the TIC Investors are  
3 acting in bad faith to gerrymander their plan votes "to artificially  
4 create an impaired consenting class." Id.

5 While plan proponents have substantial flexibility under  
6 § 1123 to classify claims based on differentiating business and other  
7 circumstances, they go too far when a class of claims is "plainly  
8 contrived and engineered solely to create an accepting impaired class."  
9 In re Daly, 167 B.R. 734, 736 (Bankr. D. Mass. 1994).

10 This contrived and artificial impairment can be viewed  
11 either as a violation of the requirement of an  
12 accepting impaired class, § 1129(a)(10), or as a  
13 violation of the requirement that the plan be proposed  
in good faith, § 1129(a)(3), or as both. Whichever  
way it is viewed, it prevents confirmation of the  
plan.

14 Id. at 737. See also Connecticut General Life Ins. Co. v. Hotel Assoc.  
15 (In re Hotel Assoc.), 165 B.R. 470, 475 (9th Cir. BAP 1994) ("[T]he act  
16 of impairment in an attempt to gerrymander a voting class of creditors is  
17 indicative of bad faith" for purposes of § 1129(a)(3).).

18 Section 1129(a)(10) is designed to require a showing in  
19 support of plan confirmation that a meaningful group of creditors other  
20 than the plan proponent support the plan. "The purpose of § 1129(a)(10)  
21 is to provide some indicia of support by affected creditors and prevent  
22 confirmation where such support is lacking." In re Lettick Typographic,  
23 Inc., 103 B.R. 32, 38 (Bankr. D. Conn. 1989). As noted by NSA and the  
24 Receiver, only the TIC Investors, Carburton, and one unsecured creditor  
25  
26

1 voted in favor of the TIC Plan. See Ballot Summary, Docket No. 371.<sup>5</sup>

2           The TIC Investors respond to the objections of NSA and the  
3 Receiver that their amendment to create the new Class 11 for the  
4 unsecured claims of the TIC Investors and Carburton conforms the TIC Plan  
5 to the requirements of § 1123(a)(4) and thus cannot be inappropriate  
6 gerrymandering of class votes as a matter of law. Section 1123(a)(4)  
7 provides that a chapter 11 plan "shall . . . (4) provide the same  
8 treatment for each claim or interest of a particular class, unless the  
9 holder of a particular claim or interest agrees to a less favorable  
10 treatment of such particular claim or interest." The TIC Investors point  
11 out accurately that there are real differences between general unsecured  
12 creditors and the TIC Investors because of the TIC Investors' ownership  
13 interests independent of the Debtor in assets of Orchards Village that  
14 are essential to the success of any plan in this case. While I find that  
15 the argument that § 1123(a)(4) "mandates" placing the unsecured claims of  
16 the TIC Investors and Carburton in a separate class overstates the case,  
17 the differences between the TIC Investors and Carburton, and general  
18 unsecured creditors are real and material, justifying separate  
19 classification. But for the timing, I doubt that the TIC Investors'  
20 designation of their new Class 11 would be controversial.

21           The Ninth Circuit standard for the designation of impaired  
22 classes of claims is relatively liberal. See L&J Anaheim Assoc. v.  
23 \_\_\_\_\_

24           <sup>5</sup> The TIC Investors have filed their own ballot summary, on a  
25 postamendment basis, that is not materially different from the Ballot  
26 Summary, Docket No. 371, except that it reflects 100% votes to accept the  
TIC Plan by the new Class 11 as an impaired class of claims. See TIC  
Investors' Ballot Summary, Docket No. 378.

1 Kawasaki Leasing Int'l, Inc. (In re L&J Anaheim Assoc.), 995 F.2d 940,  
2 942-43:

3 "Congress define[d] impairment in the broadest  
4 possible terms." In re Madison Hotel Associates, 749  
5 F.2d 410, 418 (7th Cir. 1984) (quoting In re Taddeo,  
6 685 F.2d 24, 28 (2d Cir. 1982)). Indeed, we ourselves  
7 have suggested that under this broad definition, "any  
8 alteration of the rights constitutes impairment even  
9 if the value of the rights is enhanced." In re  
10 Acequia, 787 F.2d at 1363 (dictum) (quoting 5 Collier  
11 on Bankruptcy ¶ 1124.03, at 1124-13 (15th ed. 1985)) .  
12 . . . In any event, the plain language of section 1124  
13 says that a creditor's claim is "impaired" unless its  
14 rights are left "unaltered" by the Plan.

15 In the circumstances of this case, I find that the TIC Investors'  
16 designation of their new Class 11 is appropriate. However, I also find  
17 the timing of the TIC Plan amendment to designate the new class after the  
18 balloting deadline had passed is questionable, and this discussion  
19 highlights the very limited number of claimants, both affiliated with the  
20 TIC Investors and unaffiliated, that voted to accept the TIC Plan.

21 The remaining objections of the Receiver cause me to return  
22 to the well-plowed ground of feasibility. The Receiver raises several  
23 arguments to the effect that the on-going receivership proceedings before  
24 the Superior Court effectively preclude the TIC Investors from  
25 implementing the TIC Plan if it is confirmed. As I noted in addressing  
26 the objections of the Buy-In Residents above, the receivership  
proceedings undoubtedly would complicate the transfer of Orchards Village  
operations from the Receiver and Regency Pacific, Inc. to Encore, but  
there is nothing to preclude the TIC Investors from moving to terminate  
the receivership proceedings if the TIC Plan is confirmed. The vigor  
with which this case has been contested suggests that any such motion

1 would be actively opposed, and I do not know how the Superior Court might  
2 rule in such circumstances. However, once again, I find that the present  
3 existence of the receivership proceedings does not destroy feasibility  
4 for the purposes of § 1129(a)(11).

5 d. NSA Objections

6 Beyond the objections to the TIC Plan raised by other  
7 parties as well as NSA and previously discussed above, NSA raises two  
8 principal additional objections.

9 First, NSA argues that the TIC Investors have not met their  
10 burden to establish that the TIC Plan "has been proposed in good faith  
11 and not by any means forbidden by law," as required by § 1129(a)(3).  
12 This argument raised in NSA's filed objections (Docket Nos. 351 and 361)  
13 was elaborated on in final argument after the presentation of evidence at  
14 the Confirmation Hearing.

15 "Good faith" is not defined in the Bankruptcy Code.  
16 "A plan is proposed in good faith where it achieves a  
17 result consistent with the objectives and purposes of  
18 the Code." In re Sylmar Plaza, L.P., 314 F.3d 1070,  
19 1074 (9th Cir. 2002). Accord In re Madison Hotel  
20 Assoc., 749 F.2d 410, 425 (7th Cir. 1984) (good faith  
21 "is generally interpreted to mean that there exists 'a  
22 reasonable likelihood that the plan will achieve a  
23 result consistent with the objectives and purposes of  
24 the Bankruptcy Code.'"). It "requires a fundamental  
25 fairness in dealing with one's creditors." In re  
26 Jorgensen, 66 B.R. 104, 109 (9th Cir. BAP 1986). In  
making that determination, the court considers the  
totality of the circumstances. Sylmar Plaza, LP, 314  
F.3d at 1074. Purposes of the Code "include  
facilitating the successful rehabilitation of the  
debtor, and maximizing the value of the bankruptcy  
estate." In re Gen. Teamsters, Warehousemen and  
Helpers Union, Local 890, 265 F.3d 869, 877 (9th Cir.  
2001).

Amended Memorandum Opinion re Confirmation of Plan, In re Carolina

1 Tobacco Co., Case No. 05-34156, Docket No. 507, at p. 25.

2 I previously have discussed the issue of the TIC Investors'  
3 amendment to the TIC Plan after the balloting deadline to create a new  
4 Class 11 as an additional impaired class of claims that voted unanimously  
5 to accept the TIC Plan and thus resolved the TIC Investors' § 1129(a)(10)  
6 problem. NSA and the Receiver also question the TIC Investors'  
7 compliance with law in soliciting subscriptions for investments in the  
8 reorganized Debtor.

9 Under the Securities Act of 1933, 15 U.S.C. §§ 77a et seq.  
10 (the "1933 Act"), an entity that offers or sells its securities must  
11 register its securities with the Securities and Exchange Commission  
12 ("SEC") pursuant to the registration requirements of the 1933 Act unless  
13 an exemption applies. Section 1145 provides such an exemption for offers  
14 of securities of the debtor "in exchange for a claim against, an interest  
15 in, or a claim for an administrative expense in the case concerning, the  
16 debtor . . . ." § 1145(a)(1)(A).

17 Under the TIC Plan, the interests of equity holders in the  
18 Debtor (Class 8) would be cancelled. However, the TIC Investors and  
19 Carburton (Class 11), in exchange for cancellation of their unsecured  
20 claims against the Debtor, have the option of retaining their tenant in  
21 common ownership interests in real and personal property assets of  
22 Orchards Village or exchanging their tenant in common interests for  
23 membership interests in the reorganized Debtor. It would appear that the  
24 registration exemption provided by § 1145 would cover such exchanges.

25 However, as noted in the summary of the TIC Plan included  
26 above, the TIC Investors, Carburton, prepetition members of the Debtor

1 and creditors also are offered the opportunity to invest in new  
2 membership interests in the reorganized Debtor in cash increments of  
3 \$10,000 up to a total of \$1,250,000, and the exemption provided by § 1145  
4 does not apply to such offerings. The TIC Investors need another  
5 exemption(s) to avoid the registration requirements of the 1933 Act.  
6 See, e.g., In re Friedman's, Inc., Case No. 05-40129, 2005 Bankr. LEXIS  
7 3140, at \*31-\*32 (Bankr. S.D. Ga. November 23, 2005):

8       Distributions of New Common Stock as contemplated by  
9       the Plan by the Debtors is exempt from the  
10       requirements of section 5 of the [1933 Act] and state  
11       registration requirements (1) by virtue of section  
12       1145 of the Bankruptcy Code, as to distributions to  
13       holders of Class 1 Lender Claims and Class 4(b)  
14       Participating Vendor Claims, and (2) by virtue of  
15       section 4(2) of the [1933 Act], as to distributions to  
16       the Plan Investor that are made in exchange for the  
17       Plan Investor's other cash investments.

18 Also see In re Bally Total Fitness, Case No. 07-12395, 2007 Bankr. LEXIS  
19 4279, at \*33-\*34 (Bankr. S.D.N.Y. September 17, 2007).

20       The Unit Subscription Agreements signed by investors  
21       subscribing to purchase member interests in the reorganized Debtor under  
22       the TIC Plan require investors to state whether they are or are not  
23       "accredited investors." See Exhibits 200 and 217, in each case on page  
24       2, section 3(g). All of the subscribing investors characterized  
25       themselves individually as "accredited investors," or in the case of  
26       entities, as having all "accredited investors" as equity holders, except  
27       Kenneth Waldroff, who subscribed individually for \$50,000 but stated that  
28       he was not an "accredited investor." See Exhibit 200, at p. 20.

29       SEC Regulation D in Rule 501 defines an "accredited  
30       investor," in relevant part, as:

1        5. a business in which all of the equity owners are  
2        accredited investors;  
3        6. a natural person who has individual net worth, or  
4        joint net worth with the person's spouse, that exceeds  
5        \$1 million at the time of the [investment] purchase;  
6        7. a natural person with income exceeding \$200,000 in  
7        each of the two most recent years or joint income with  
8        a spouse exceeding \$300,000 for those years and a  
9        reasonable expectation of the same income level in the  
10       current year; or  
11       8. a trust with assets in excess of \$5 million, not  
12       formed to acquire the securities offered, whose  
13       purchases a sophisticated person makes.

14                SEC Regulation D Rule 506 provides an exemption from  
15       registration in nonpublic, private placement securities offerings for  
16       sales to accredited investors and up to thirty-five nonaccredited  
17       investors.<sup>6</sup> The rationale for not requiring registration of securities  
18       to be offered to "accredited investors" is the assumed sophistication of  
19       such investors to evaluate the risks of prospective investments. "We  
20       adopted the \$1,000,000 net worth and \$200,000 income standards in 1982  
21       based on our view that these tests would provide appropriate and  
22       objective standards to meet our goal of ensuring that only such persons  
23       who are capable of evaluating the merits and risks of an investment in  
24       private offerings may invest in one." Securities Act Release No. 6389  
25       (March 16, 1982). In other words, only individuals with adequate net  
26       worth or income to be able to withstand the risk of the loss of their  
27       securities investments could be characterized as "accredited investors."

28                At the Confirmation Hearing, John Schnell, Phil DeNardis

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29        <sup>6</sup> Regulation D implements Section 4(2) of the 1933 Act that  
30        provides: "the provisions of Section 5 shall not apply to . . . (2)  
31        transactions by an issuer not involving any public offering." 15 U.S.C.  
32        § 77d(2).



1 and Jack Burgess testified individually and James Oberholtzer testified  
2 in behalf of CP8A, LLC as to their respective unit subscriptions with  
3 respect to the reorganized Debtor. Mr. Muhlbach testified in behalf of  
4 Encore. All of these witnesses confirmed the availability of the  
5 subscribed funds to invest in Debtor member units if the TIC Plan is  
6 confirmed. They further confirmed their accredited status as  
7 individuals, or in the case of entities, the accredited investor status  
8 of all equity owners. They also confirmed that they had received and  
9 reviewed the plan and disclosure statement documents. Kenneth Waldroff  
10 did not testify, and he was the only individual investment subscriber who  
11 identified himself as not an accredited investor. As noted above, the  
12 exemption from registration under SEC Rule 506 allows for up to 35  
13 investors who are not accredited investors in a private placement  
14 offering. Based on the evidence presented at the Confirmation Hearing, I  
15 find that the TIC Investors have presented sufficient evidence to  
16 establish that the new member units in the reorganized Debtor are not  
17 being offered in violation of federal bankruptcy or securities laws.

18 NSA further argue that the TIC Plan is not proposed in good  
19 faith because the TIC Investors have proposed their plan for their own  
20 benefit rather than for the benefit of the Debtor and other creditors in  
21 this case. It is clear that the TIC Investors have proposed the TIC Plan  
22 to protect against the loss of their investments in Orchard Village.  
23 Under the Joint Plan, they receive nothing. However, the fact that a  
24 party before this court is motivated by self-interest does not  
25 automatically lead to the conclusion that its chapter 11 plan is not  
26 proposed in good faith.

1 Under the TIC Plan, provisions are made to pay all creditor  
2 constituencies all or at least part of their allowed claims. In addition  
3 to paying creditor claims, the TIC Plan provides the TIC Investors with  
4 the opportunity to salvage their investments and obtain a return on new  
5 money put at risk through operations of the reorganized Debtor. I have  
6 found that the TIC Plan is feasible for purposes of the test of  
7 § 1129(a)(11). I have noted the questionable timing of the TIC  
8 Investors' amendment of their plan to create the new Class 11 impaired  
9 class of claims, but based upon my review of the evidence presented in  
10 the totality of the circumstances of this case, I ultimately conclude  
11 that the TIC Plan has been proposed in good faith and not by any means  
12 forbidden by law for purposes of § 1129(a)(3).

13 Further, based on the evidence presented at the  
14 Confirmation Hearing, I find that the TIC Plan satisfies all of the  
15 applicable requirements for confirmation set forth in § 1129(a), except  
16 § 1129(a)(8) because a number of impaired classes of claims did not vote  
17 to accept the TIC Plan.

18 This leads me to the discussion of NSA's objection that in  
19 light of NSA's vote to reject the TIC Plan, the TIC Plan does not meet  
20 the standards for cramdown of NSA's secured claim under § 1129(b)(2)(A).<sup>7</sup>

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21  
22 <sup>7</sup> § 1129(b)(2)(A) provides:

23 For the purposes of this subsection, the condition that a plan  
24 be fair and equitable with respect to a class includes the  
25 following requirements:

26 (A) With respect to a class of secured claims, the plan  
provides-

(i)(I) that the holders of such claims retain the liens  
securing such claims, whether the property subject to such

(continued...)

1 I will sustain NSA's objection to confirmation on this ground based on my  
2 consideration of the following factors.

- 3 i. NSA's treatment under the TIC Plan is not the  
4 indubitable equivalent of its claim.

5 NSA's predecessor in interest, First State Bank of  
6 Thermopolis, made a construction loan ("Loan") for the development of  
7 Orchards Village. See Exhibit 100. The unaccelerated maturity date of  
8 the Loan was September 20, 2008. See Exhibit 101, at p. 2. The Loan  
9 matured prepetition. I previously have determined that the Debtor  
10 defaulted on the Loan, and Debtor's Loan defaults are on-going and  
11 uncured. See Memorandum Opinion, Docket No. 113, at p. 3. The default  
12 interest rate on the Loan is prime plus 637.5 Basis Points, i.e., prime  
13 plus 6.375%. See Exhibit 101 at pp. 1, 3. At the time of the  
14 Confirmation Hearing, with a prime rate of 3.25% based on uncontroverted

15 \_\_\_\_\_  
16 <sup>7</sup>(...continued)

17 liens is retained by the debtor or transferred to another  
18 entity, to the extent of the allowed amount of such claims; and

19 (II) that each holder of a claim of such class receive on  
20 account of such claim deferred cash payments totaling at least  
21 the allowed amount of such claim, of a value, as of the  
22 effective date of the plan, of at least the value of such  
23 holder's interest in the estate's interest in such property;

24 (ii) for the sale, subject to section 363(k) of this  
25 title, of any property that is subject to the liens securing  
26 such claims, free and clear of such liens, with such liens to  
attach to the proceeds of such sale, and the treatment of such  
liens on proceeds under clause (i) or (iii) of this  
subparagraph; or

(iii) for the realization by such holders of the  
indubitable equivalent of such claims.

25 Since the TIC Plan does not contemplate a sale of Orchards Village,  
26 § 1129(b)(2)(A)(ii) is not relevant to my analysis.

1 evidence presented by the TIC Investors, the default interest rate on the  
2 Loan would be 9.625%.

3           Under the TIC Plan, as noted above, NSA would be paid  
4 interest only on the allowed amount of its secured claim at the rate of  
5 5% per annum for the first three years of the TIC Plan term; NSA would  
6 receive payments of principal and interest amortized over a 30-year term  
7 for the next four years; and NSA would be paid the balance of principal  
8 and accrued interest on its allowed secured claim at the end of the seven  
9 year term of the TIC Plan. During this period, NSA would retain its  
10 security interests in Orchards Village.

11           The concept of "indubitable equivalence" comes from the  
12 decision written by Judge Learned Hand in Metropolitan Life Ins. Co. v.  
13 Murel Holding Corp. (In re Murel Holding Corp.), 75 F.2d 941, 942 (2d  
14 Cir. 1935):

15           [Payment ten years hence is not generally the  
16 equivalent of payment now. Interest is indeed the  
17 common measure of the difference, but a creditor who  
18 fears for the safety of his principal will scarcely be  
19 content with that; he wishes to get his money or at  
least the property. We see no reason to suppose that  
the statute was intended to deprive him of that in the  
interest of junior holders, unless by a substitute of  
the most indubitable equivalence. (Emphasis added.)

20           The Ninth Circuit approved the following analysis of  
21 "indubitable equivalence" in Arnold & Baker Farms v. United States (In re  
22 Arnold & Baker Farms), 85 F.3d 1415, 1421 (9th Cir. 1996):

23           [N]o matter how hot the market for real estate may  
24 become in the future, the market for farm real estate  
25 here and now is not such as would permit us to hold  
26 that the value of the land being offered is the  
indubitable equivalent of [the mortgagee]'s claim.  
"Indubitable" means "too evident to be doubted."  
Webster's Ninth New Collegiate Dictionary (1985). We

1           profess doubt on the facts of this case.

2   (quoting In re Walat Farms, Inc., 70 B.R. 330, 334 (Bankr. E.D. Mich.  
3 1987)).

4           Under the TIC Plan, the NSA allowed secured claim is to  
5 be paid at a below market rate of interest (as discussed in greater  
6 detail below) over a term of seven years, with a substantial balloon  
7 payment due at the end of seven years, with prospects for refinancing  
8 unclear. I find that the treatment of NSA's secured claim under the TIC  
9 Plan is not its indubitable equivalent.

10           ii. Interest at 5% on NSA's allowed secured claim is too  
11 low.

12           The TIC Plan proposes to pay interest on NSA's allowed  
13 secured claim at "the rate of 5 percent per annum, or such other rate as  
14 the Bankruptcy Court may determine." The Projections assume that NSA's  
15 claim will bear interest at 5%. See Exhibit 201, at p. 8.

16           Generally, the appropriate rate of interest or discount  
17 factor to be applied to the payment of secured claims under a chapter 11  
18 plan "should be the rate of interest that the debtor would pay to borrow  
19 a similar amount on similar terms in the commercial loan market." United  
20 States v. Camino Real Landscape Maintenance Contractors, Inc. (In re  
21 Camino Real Landscape Maintenance Contractors, Inc.), 818 F.2d 1503, 1506  
22 (9th Cir. 1987). Calculating the rate starts with an appropriate base  
23 rate plus the addition of a factor for risk. Id.

24           The TIC Investors have asserted that the prime rate is  
25 the appropriate base rate in this case, without contradiction. At the  
26 time of the Confirmation Hearing, as noted above, the prime rate was

1 3.25%. In effect, the TIC Investors propose to add a risk factor of  
2 1.75% to the base rate to arrive at the 5% rate that they suggest is  
3 appropriate to apply to NSA's allowed secured claim during the term of  
4 their plan. The problem I face is that the TIC Investors have presented  
5 no relevant evidence to support the calculation of their risk factor.

6           The TIC Investors presented the testimony of Mr. Thomas  
7 Peters to discuss lending terms with respect to senior assisted living  
8 projects. Mr. Peters testified that he was a partner in CW Capital that  
9 historically has competed with banks in commercial lending. He further  
10 testified that at the present time, lending in the senior housing  
11 business basically has dried up--"HUD's the only--only game in town."  
12 Transcript of Confirmation Hearing, Docket No. 386, at p. 199. He  
13 testified that HUD loans could be obtained at interest of 4.75% plus 55  
14 basis points, or 5.3%, for a term of 35 years. Id. at p. 200. However,  
15 I find that the rate of interest that can be obtained from the Department  
16 of Housing and Urban Development, an agency of the federal government, is  
17 not relevant to what rate of interest can be obtained in the commercial  
18 marketplace. Federal agencies' conduct is dictated at least in part by  
19 the policies they serve rather than by market forces. Cf. Camino Real  
20 Landscape Maintenance Contractors, 818 F.2d at 1506 ("To be properly  
21 compensated, [the creditor] must receive the rate of interest based on  
22 the debtor's cost of borrowing, not the government's. [citation omitted]  
23 There is no indication that Congress meant to subsidize debtors  
24 undergoing reorganization by making available to them the government's  
25 own favorable rate of interest.").

26           NSA's witness, Mr. John Steven Gordon, the owner of

1 Phoenix, LLC, which provides consulting services to the senior housing  
2 industry, testified that the conventional financing market for senior  
3 housing projects is very tight. To obtain a loan in that market, one  
4 would need a "pristine project" with "solid operational results."  
5 Transcript of the Confirmation Hearing, docket No. 387, at pp. 309-10.  
6 One also would need "stabilized occupancy around 95 percent." Id. at  
7 311. Such a project, with an appropriate loan to value ratio, might  
8 obtain a loan bearing interest at "six to ten percent." Id. at 312.  
9 While operations at Orchards Village have improved, its occupancy is not  
10 stabilized, and to refinance at present would essentially require 100%  
11 financing. The interest rates that Mr. Gordon suggested might be  
12 available at present for certain senior living projects simply are not  
13 applicable in the circumstances of Orchards Village, seeking to emerge  
14 from bankruptcy. Further, the lowest rate mentioned by Mr. Gordon is  
15 higher than the 5% interest that the TIC Investors propose to pay NSA  
16 under their plan.

17               During argument, counsel for the TIC Investors  
18 suggested that even if I were to decide that the proposed 5% rate for NSA  
19 was too low, I could determine an appropriate rate, as allowed for in the  
20 TIC Plan, under the standards set forth in the Supreme Court's decision  
21 in Till v. SCS Credit Corp., 541 U.S. 465 (2004). I decline to do so.

22               While Till was a chapter 13 case, a footnote to the  
23 plurality opinion suggests that its analysis may be appropriate in  
24 chapter 11. See Id. at 474 n.10. Under the "formula approach" to  
25 determining the proper interest rate adopted in Till, the court starts  
26 with the prime rate and adjusts it upward for an appropriate risk factor

1 determined from the presentation of evidence. Id. at 479.

2           In this case, I have evidence as to the prime rate  
3 (3.25%) at the time of the Confirmation Hearing. However, as discussed  
4 above, while I have evidence that leads me to conclude that the 5%  
5 interest rate proposed for NSA in the TIC Plan is too low, I have  
6 inadequate evidence to determine the appropriate risk factor to add to  
7 the prime rate. I simply have too little evidence to impose my view as  
8 to what constitutes a satisfactory interest rate in the cramdown context.  
9 See, e.g., In re Edgewater Motel, Inc., 85 B.R. 989, 997 (Bankr. E.D.  
10 Tenn. 1988) ("[I]f the Plan proposes to pay interest on the fully secured  
11 claim of Union Planters at a rate less than the current market rate, the  
12 Plan does not satisfy the 'fair and equitable' requirement of  
13 § 1129(b)(2)(A)(i).").

14           iii. The length of the proposed "stretch out" of payments  
15 to NSA.

16           The Loan was made as a three-year construction loan,  
17 with a possible extension for a fourth year. See Exhibit 100, at pp. 1,  
18 10 and 18. The Loan matured on September 20, 2008. See Exhibit 101, at  
19 p. 2. Now, approximately 15 months later, the TIC Plan provides that  
20 repayment of the Loan, i.e., NSA's allowed secured claim, would be  
21 extended out a further 7 years.

22           The fact that a secured creditor's loan repayment term  
23 is extended beyond contract limits does not automatically breach the  
24 "fair and equitable" requirement for cramdown of a secured claim under  
25 § 1129(b)(2)(A), so long as the secured creditor's claim is adequately  
26 protected. See, e.g., In re James Wilson Assoc., 965 F.2d 160, 172 (7th



1 Cir. 1992) ("Since Metropolitan is in the business of making loans, it  
2 can hardly complain that its loan was extended, provided not only that  
3 the security is adequate (as it is) but also that the interest rate  
4 compensates it for the opportunity cost of its money and the risk of  
5 default."); In re Mulberry Agr. Enterprises, Inc., 113 B.R. 30, 33  
6 (Bankr. D. Kan. 1990):

7       The Court believes that § 1129 does not per se  
8       prohibit long term payouts. If the mathematical  
9       requirements of § 1129(b)(2)(A)(i)(II) are satisfied,  
10      if the creditor is adequately protected under the  
11      plan, pursuant to the general fair and equitable  
12      requirement of § 1129(b)(2), and if the debtors can  
13      prove they can make payments over the life of the plan  
14      pursuant to § 1129(a)(11), then the plan is  
15      confirmable and can be crammed down on a rejecting  
16      class of secured claim holders, regardless of normal  
17      lending practices or policies.

18 (quoting In re White, 36 B.R. 199, 203 (Bankr. D. Kan. 1983)).

19       However, a plan proposal to extend a matured, short-  
20 term loan over a substantially longer term is subject to particularly  
21 close scrutiny, as determined in Imperial Bank v. Tri-Growth Centre City,  
22 Ltd. (In re Tri-Growth Centre City, Ltd.), 136 B.R. 848, 852 (Bankr. S.D.  
23 Cal. 1992), where the debtor attempted unsuccessfully to extend a fully  
24 matured construction loan for a further term of 7 years: "Although not  
25 per se objectionable, careful scrutiny must be given to a debtor's plan  
26 which proposes to convert a fully matured short term loan into permanent  
financing." See also In re Pelham St. Assoc., 134 B.R. 700, 701 (Bankr.  
D.R.I. 1991). This point brings me to the next discussion.

iv. No evidence was presented to establish that the  
reorganized Debtor will be able to refinance its  
debt at the end of the 7-year term of the TIC Plan.

NSA and the Receiver presented evidence as of

1 December 1, 2009 that the amount of NSA's secured claim, including  
2 accrued interest at the default rate, late fees and expenses, was  
3 \$14,962,608.97. See Exhibit 145. The Projections assume that after the  
4 claims allowance process is completed, NSA's allowed secured claim would  
5 be \$13,800,000. See Exhibit 201, at p. 8. Whichever amount ends up  
6 being correct, including the possibility that NSA's allowed secured claim  
7 may end up being somewhere between the two, under the TIC Plan, with its  
8 provisions for interest only for three years and payments amortized over  
9 30 years for the next four years, the balloon payment owing to NSA at the  
10 end of 7 years would be many millions of dollars.

11           The evidence presented at the Confirmation Hearing  
12 tended to establish that conventional financing for senior living  
13 facilities, such as Orchards Village, is currently unavailable. Mr.  
14 Muhlbach testified that he assumed the lending environment will improve,  
15 and refinancing for Orchards Village in an improved market should be  
16 available at the end of the TIC Plan term. I have found that hope and  
17 assumption to be adequate to get the TIC Plan past the relatively  
18 forgiving standard for feasibility in § 1129(a)(11), but it is not  
19 sufficient to support a cramdown of NSA's claim under  
20 § 1129(b)(2)(A)(i)(II). Were I to overrule NSA's cramdown objections, I  
21 would be permitting the TIC Investors to speculate on an uncertain future  
22 lending environment not only with their own funds, but with NSA's money  
23 as well. I find that is not authorized or appropriate under  
24 § 1129(b)(2)(A)(i)(II). See, e.g., In re Tri-Growth Centre City, Ltd.,  
25 136 B.R. at 852 ("Imperial's rewritten loan is only partially amortized  
26 over a 7 year term. The debtor attempts to shift the risks associated

1 with a declining motel business on a secured creditor who did not bargain  
2 for those risks when it initially lent the funds."); In re White, 36 B.R.  
3 199, 204 (Bankr. D. Kan. 1983) ("While it might be interesting for the  
4 debtors, the court, and PCA to spend the next 30 years watching the  
5 debtors' cash flow, this Court cannot allow confirmation out of curiosity  
6 or interest."), and cases cited therein.

7 I find that the TIC Investors have not satisfied the  
8 "fair and equitable" standard for cramdown of NSA's claim under  
9 § 1129(b)(2)(A), and I will sustain NSA's objection to cramdown. Since  
10 the TIC Plan does not satisfy the requirements for confirmation under  
11 § 1129(b), I will deny confirmation of the TIC Plan.

12 E. Section 1129(c) Considerations

13 Even if both the Joint Plan and the TIC Plan satisfied all  
14 requirements for confirmation under § 1129(a) and (b), as noted above,  
15 § 1129(c) allows me to confirm only one plan. Specifically, § 1129(c)  
16 provides, in relevant part: "If the requirements of subsections (a) and  
17 (b) of this section are met with respect to more than one plan, the court  
18 shall consider the preferences of creditors and equity security holders  
19 in determining which plan to confirm."

20 In this case, again, even if both the Joint Plan and the TIC  
21 Plan satisfied all the confirmation requirements of § 1129(a) and (b), I  
22 would confirm the Joint Plan and deny confirmation of the TIC Plan for  
23 the following reasons.

24 Based on the clear terms of § 1129(c), I give primary  
25 consideration to the preferences of creditors and equity holders. See,  
26 e.g., In re Coram Healthcare Corp., 315 B.R. 321, 351-52 (Bankr. D. Del.

2004); In re Turner Engineering, Inc., 109 B.R. 956, 961 (Bankr. D. Mont. 1989). NSA, Washington Trust, LSR Architects, Inc., the City of Vancouver, Washington, and all seven Buy-In Residents voted for and/or expressed a preference for the Joint Plan. The TIC Investors and their affiliates, Carburton and LCG Pence Construction, Inc. voted for and/or expressed a preference for the TIC Plan. In other words, the TIC Investors and one other party with tenant in common interests in Orchards Village (Carburton) prefer the Joint Plan, along with one general unsecured creditor. The clear preference among interested parties in this case is for the Joint Plan. See Ballot Summary, Docket No. 371, and TIC Investors' Ballot Summary, Docket No. 378.

In addition to creditor preferences, some courts consider some other factors in deciding § 1129(c) issues. See, e.g., In re Holley Garden Apartments, Ltd., 238 B.R. 488, 493 (Bankr. M.D. Fla. 1999):

The following factors should be considered in determining which competing plan to confirm, if more than one plan is confirmable: (1) the type of plan; (2) the treatment of creditors and equity security holders; (3) the feasibility of the plan; and (4) the preferences of creditors and equity security holders.

The TIC Plan is a "reorganization" plan while the Joint Plan is a "sale" or "liquidation" plan. "[T]he courts have stated in numerous contexts that reorganization is preferable to liquidation and the philosophy of the Bankruptcy Code is to preserve economic units." In re Oaks Partners, Ltd., 141 B.R. 453, 465 (Bankr. N.D. Ga. 1992). See also In re Holley Garden Apartments, Ltd., 238 B.R. at 495. However, the differences between the two competing plans in this case are more form than substance.

1 Under both plans, the operator of Orchards Village will change  
2 from Regency Pacific, Inc.: to Merrill Gardens under the Joint Plan and  
3 to Encore under the TIC Plan. Of course, neither plan suggests any  
4 intent to displace the current residents of Orchards Village, and neither  
5 Merrill Gardens nor Encore has expressed any wish or intent not to re-  
6 employ employees who currently provide services at Orchards Village and  
7 who would choose to remain when Regency Pacific, Inc. leaves. Under the  
8 TIC Plan, the TIC Investors and Carburton could choose to retain their  
9 tenant in common interests in Orchards Village or exchange those  
10 interests for member interests in the reorganized Debtor. In addition,  
11 some of the subscribing equity investors in the reorganized Debtor had  
12 equity interests in the prepetition Debtor. There consequently appears  
13 to be overlap in equity. Considering the "types" of the competing plans,  
14 I conclude that this factor favors the TIC Plan slightly.

15 Since the Joint Plan provides nothing for equity interest  
16 holders and only an unlikely possibility for a recovery by general  
17 unsecured creditors, while the TIC Plan proposes a 30% distribution on  
18 allowed general unsecured claims over time, and allows equity interests  
19 options to protect their investments in the prepetition Debtor, I find  
20 that the TIC Plan is preferable based on its treatment of interested  
21 parties across the board. I note, however, that the treatment of the  
22 claims of NSA, Washington Trust, LSR Architects, Inc. and the Buy-In  
23 Residents clearly is superior under the Joint Plan to their treatment  
24 under the TIC Plan; so, the treatment of claims and interests factor does  
25 not one-sidedly favor the TIC Plan.

26 Finally, in terms of feasibility, the Joint Plan clearly is the

1 stronger plan. The sale of Orchards Village to Merrill Gardens will  
2 allow for rapid payment of most claims provided for in the Joint Plan.  
3 There is no financing contingency to closing of the Merrill Gardens sale.  
4 Payment of claims under the TIC Plan is contingent both on the operating  
5 results for Orchards Village over a term of seven years and the  
6 availability of refinancing for Orchards Village when the balloon  
7 payments under the TIC Plan come due. The prospects for the reorganized  
8 Debtor to meet its obligations under the TIC Plan are not clear.

9 Based on my consideration of factors relevant to the evaluation  
10 of competing plans under § 1129(c), my ultimate conclusion is that I  
11 would confirm the Joint Plan rather than the TIC Plan even if both plans  
12 satisfied all conditions for confirmation under § 1129(a) and (b).

### 13 Conclusion

14 Based on the foregoing findings and conclusions, I find that  
15 the Joint Plan satisfies all the requirements for confirmation under  
16 § 1129(a) and (b) and is preferable for confirmation purposes to the TIC  
17 Plan under § 1129(c). As stated at the outset, I will confirm the Joint  
18 Plan and deny confirmation of the TIC Plan. Counsel for NSA and the  
19 Receiver should prepare and submit an appropriate form of confirmation  
20 order consistent with this Memorandum Opinion.

21 ###

22  
23 cc: Teresa H. Pearson  
24 Anita G. Manishan  
25 John R. Rizzardi  
26 John R. Knapp, Jr.  
Albert N. Kennedy  
Ava L. Schoen  
James K. Hein

Howard M. Levine  
U.S. Trustee